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IN THE

Supreme Court of the United States

October Term, 1942

No. 60

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

Official Reports of Opinions Herein.

The opinions delivered in the courts below were officially reported as follows:

A. The opinion of the Supreme Court of California now under review [R. 41-47] in 18 Cal. (2d) 835.

B. The opinion of the Supreme Court of California on the first hearing [R. 36-40] in 105 Pac. (2d) 919.

C. The opinion of the California District Court of Appeal, after which a hearing in the Supreme Court was granted [R. 32-5] in 98 Pac. (2d) 766.

D. The opinion of the trial court is not reported, officially or otherwise, but appears in the record herein at page 7.

In the state courts the case was entitled: E. C. Moore, I. Zellerbach, A. T. Jergens, as the Fish and Game Commission of the State of California, *Petitioners* and *Appellees*, v. Purse Seine Net, approximately 325 fathoms long, 32 fathoms deep, approximate size of mesh five to eight inches, *Respondent*; C. J. Hendry Company, a corporation, and Frank Sematovich, *Claimants* and *Appellants*.

Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this court is invoked upon the following grounds:

1. The cause is one wherein there was drawn into question the validity of a statute of the State of California on the grounds of its being repugnant to the Constitution and laws of the United States, and the decision of the highest state court was in favor of its validity.

Judicial Code, Sec. 237a; 28 U. S. C. A. 344a.

2. The cause is one wherein there was drawn into question the validity of a statute of said state on the grounds of its being repugnant to the Constitution and laws of the United States, and one in which a right and immunity are specially set up by the petitioners under the laws of the United States.

Judicial Code, Sec. 237b; 28 U. S. C. A. 344b.

3. The Supreme Court of California has decided a substantial Federal question, in a way not in accord with the applicable decisions of this Court.

Rules of the Supreme Court, Rule 38 (5)a.

Statement of the Case.

Section 845 of the Fish and Game Code of the State of California provides as follows:

> "*Seizure and sale of nets.* Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the Superior Court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for the hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State Treasury to the credit of the fish and game preservation fund."

Fish and Game District No. 20 consists of certain navigable waters of the Pacific Ocean adjacent to Catalina Island. These waters are within the state's territorial jurisdiction, and in them it is unlawful to take fish by other means than by hook and line. (Fish and Game Code; Secs. 89, 842.)

The fishing boat RELIANCE was a diesel powered purse seiner about 70 feet long [R. 18] and was equipped with the purse seine net named as respondent in the proceedings commenced herein, with which she performed her function of fishing [R. 18]. On June 18, 1936, she was boarded by California enforcement officers while she was lying in the said navigable waters off Catalina Island and within Fish and Game District No. 20 [R. 17]. The respondent net had been pursed, was partially on board the vessel and partially in the water, and contained a quantity of blue fin tuna [R. 14, 15]. One of the enforcement officers arrested the RELIANCE'S master and crew, seized and marked the respondent net, and caused it to be taken to Los Angeles, where he delivered it to the Fish and Game Commissioners [R. 16].

On June 24, 1936, the Fish and Game Commissioners filed in the Superior Court of the State of California, in and for the County of Los Angeles, the petition in this proceeding [R. 1], alleging in substance that the net had been unlawfully used in the prohibited waters; that a duly qualified enforcement officer then and there seized the net and retained possession thereof, and that the same was and is a public nuisance. The prayer was that the net be adjudged forfeited and ordered destroyed or sold. Pursuant to the procedural scheme of the state statute (*Sec. 845, supra*), the clerk fixed a time and place for hearing the petition [R. 2], and the notices provided by the statute [R. 3] were timely and properly posted [R. 4].

Prior to the day set for hearing the petition, the petitioners here, owners of the seized net, filed their claim thereto [R. 4], their demurrer to the petition, challenging, among other things, the jurisdiction of the court over the net and the subject matter of the petition [R. 5], and their answer [R. 6]. After hearing, the trial court gave its judgment, adjudging the net to be forfeited to the State of California [R. 10]. A written opinion of the trial judge dealt principally with the question here under review [R. 7].

The cause, on appeal, was heard first by the District Court of Appeal, and twice by the Supreme Court of the State of California. The District Court of Appeal affirmed the judgment below [R. 32]. The Supreme Court took jurisdiction upon petition for hearing after judgment in the District Court of Appeal [R. 35], and in its first opinion [R. 36] reversed the judgment below and ordered the proceeding dismissed for lack of jurisdiction. On rehearing, that judgment was discarded and the judgment below finally affirmed [R. 41]. Certiorari was granted by this court to review the last mentioned judgment [R. 54].

Specification of Errors Intended to be Urged.

These petitioners at all times opposed the jurisdiction of the trial court in this proceeding on the ground that the cause of action was maritime and of admiralty cognizance; that the proceeding provided by the state statute and taken in the trial court was the conventional proceeding *in rem*, according to the course of the civil law; and that the State of California was without power to vest its courts with such jurisdiction under the Federal Constitution and those familiar sections of the Federal Judicial Code which vest in the District Courts of the United States exclusive jurisdiction of causes of admiralty and maritime jurisdiction, "saving to suitors, the right of a common law remedy where the common law is competent to give it."

Constitution of the United States, Art III, Sec. 2;

Judicial Code, Sec. 24 (3); U. S. C. A., Tit. 28, Sec. 41 (3);

Judicial Code, Sec. 256 (3); U. S. C. A., Tit. 28, Sec. 371 (3).

In both of its opinions the Supreme Court has upheld the petitioners' views that: (1) the cause of action herein was maritime and of admiralty cognizance; (2) the proceeding contemplated by the state statute was a proceeding *in rem*; and (3) except as to *common law remedies*, the state courts were without jurisdiction and the state legislature without power to confer such jurisdiction upon them.

In the first opinion [R. 36], written by Mr. Justice Edmonds, the state Supreme Court held that the remedy con-

templated by Section 845 of the Fish and Game Code was not a common law remedy which was saved to suitors and might be sought in the jurisdiction of the state courts, but was a remedy authorized only by the civil law, and was not a remedy which the common law was competent to give. The order was that the proceeding be dismissed.

On the rehearing the court reiterated its holding that the cause was maritime and of admiralty cognizance, but held that a proceeding *in rem in forfeiture* cases was a "traditional common law remedy" at the time of the separation of the American Colonies, and, therefore, the statutory proceeding was in substance a remedy which "the common law was competent to give" within the meaning of the saving clauses.

The essential point upon which the petitioners assert error is, therefore, a very narrow one, and is whether or not the court was right in holding that a proceeding *in rem* such as is provided in the involved California statute is a remedy which "the common law is competent to give."

That is the gist of our third and last assignment of error [R. 51], which is as follows:

> "3. The said Supreme Court erred in holding and adjudging that the proceeding in the Superior Court against the respondent net herein was 'a traditional common law remedy' and a remedy saved to suitors in causes of admiralty cognizance by Sections 24 and 256 of the Judicial Code of the United States."

Our first and second assignments of error [R. 51] are:

"1. The Supreme Court of the State of California erred in holding and adjudging that Section 845 of the Fish and Game Code of California was valid to confer jurisdiction upon the Superior Court of the State of California, in and for the County of Los Angeles, to hear and determine the petition herein, and to adjudge and decree the forfeiture of the respondent net to the State of California.

"2. The said Supreme Court erred in failing to hold and adjudge that the Superior Court was without jurisdiction of the subject matter of the proceeding herein; that under the Constitution and laws of the United States jurisdiction of said subject matter was vested exclusively in the district courts of the United States sitting in admiralty; and that Section 845 of the Fish and Game Code was invalid to confer jurisdiction of said subject matter in the said Superior Court, and so applied was repugnant to the Constitution and laws of the United States."

The petitioners will urge all three of their assignments, but it will be at once apparent that a presentation of the specific (third) assignment will reach the more general assignments, for the specific error is the root of all.

Summary of Argument.

In each of its opinions the California Supreme Court has correctly held or recognized:

That the net proceeded against was part of the equipment of a vessel; a necessary adjunct to the performance of the vessel's maritime function, and as such, in contemplation of law, as much a maritime *res* as the vessel itself.

That the proceeding authorized by the California statute and by which the net was condemned as forfeited was a proceeding *in rem*, the substantial equivalent of the proceedings of the federal courts in admiralty causes.

That as the seizure was on the navigable waters of the Pacific Ocean, the cause of action attempted to be asserted in the state Superior Court was a cause within the admiralty and maritime jurisdiction.

That the 24th and 256th sections of the United States Judicial Code vest jurisdiction of causes within admiralty jurisdiction exclusively in the District Courts of the United States sitting in admiralty, saving to suitors only the right of a common law remedy where the common law is competent to give it.

This court, in *The Moses Taylor* and many other cases, has held that a proceeding *in rem*, the substantial equivalent of the admiralty proceeding *in rem*, is not a common law remedy, but a civil law remedy, and as such is not within the saving clauses; and that jurisdiction to administer such a remedy is exclusive in the federal courts sitting in admiralty. That rule applies to all proceedings *in rem* in causes of admiralty cognizance.

The case of *Smith v. Maryland*, insofar as it implies that a state court may proceed *in rem* in a cause of mari-

time forfeiture, is contrary to the principle of *The Moses Taylor* rule, and can no longer be regarded as authoritative.

The judgment of the California Supreme Court under review holds that a proceeding *in rem* in causes for forfeiture under statutory authority was a "traditional common law remedy" within the meaning of the saving clauses, and as such may be administered within the jurisdiction of a state court. This holding is unsound because:

The existence of a statutory remedy in the laws of England prior to the separation of the American Colonies does not mean that the statute was exclusively, or at all, of common law cognizance.

The English law, and particularly its laws relating to remedies, historically included both common law and civil law remedies, and its judicial system included courts for the administration of common law and civil law remedies.

The statutes of England referred to in the Supreme Court's opinion created a new type of forfeiture, distinguishable from the ancient common law forfeiture of the property of a convicted felon, whereunder the forfeiture came about by operation of law directly upon the happening of the offense.

These statutes, in their substantive aspects, were of universal cognizance, and all courts, whether of common law or of civil law, were bound to give them effect.

But the statutes contemplated that in administering remedies, each court should proceed within the limitations of its own jurisdiction and process. They did not enlarge the remedial cognizance or jurisdiction of the common law, but contemplated only the conventional common law

remedies in a common law court, and civil law remedies in a court of civil law jurisdiction.

The California court failed to distinguish between substantive rights and burdens created by the statutes, and the remedies by which the rights were intended to be enforced.

The common law cases in England show that jurisdiction at common law was never asserted to adjudge any right or redress any wrong under these statutes, except by conventional common law process and by a judgment which operated only *in personam*, and no case suggests that a common law tribunal in a common law cause ever attempted to give a judgment *in rem*.

In England, only the courts of civil jurisdiction,—admiralty and the revenue side of the exchequer, had or asserted the power to afford remedies *in rem* in forfeiture cases.

On principle and upon authority of this court, a proceeding *in rem* in any cause is not a common law remedy but a civil law remedy, and is not saved to suitors by the Judicial Code.

It is not a remedy in common law courts which is saved, but a *common law remedy*.

The Court of Exchequer on its revenue side was not even a court of common law jurisdiction.

The attempt to qualify *The Moses Taylor* rule by excluding its operation in forfeiture causes is unsound.

If the rule be so qualified, it will destroy the uniformity and harmony of admiralty procedure and ultimately lead to the upsetting of the entire admiralty jurisdiction.

Argument.

A word of explanation may not be amiss to justify the order of our presentation in the following argument.

Our attack on the jurisdiction of the state court in this case was, of course, based upon the rule of *The Moses Taylor*, 4 Wall. 411, and the long line of cases in accord with it. The state Attorney General defended the jurisdiction by arguing: (1) that the principles of *The Moses Taylor* did not extend to forfeiture cases, and (2) that the cause of action was non-maritime. The idea that the remedy provided by Section 845 of the California Fish and Game Code was a "traditional common law remedy," recognized as such in England at the time of the separation of the American Colonies, was not advocated by the Attorney General at any stage of these proceedings. It was born, we believe, of the independent researches of the learned Justice who wrote the last opinion of the state Supreme Court, and we believe the Attorney General was as surprised as we were when that idea appeared in the court's opinion.

We presume that the Attorney General will attempt to sustain the judgment by a defense of the proceeding as a "traditional common law remedy," but we believe he will also rely for affirmance on the two other grounds which he has heretofore advocated.

In each of its opinions the state Supreme Court accepted our contention that the proceeding herein was in all essence a proceeding *in rem*, rooted in the civil law, and that the cause of action was maritime. It also held with us, by necessary implication, on the proposition that *The Moses Taylor* rule had no inherent limitations which

would render it inapplicable to forfeiture cases. In the light of the probability of attack upon those propositions, it seems desirable that the first subdivision of our argument be devoted to a brief demonstration that those preliminary propositions were correctly determined by the court. This will involve some discussion of *The Moses Taylor* case and of some of the cases which follow it. As this court has not examined *The Moses Taylor* rule for some years, such discussion may not be entirely without value.

This order of presentation was forecast in our statement of points to be relied upon [R. 52].

I.

The Cause of Action Is of Maritime Cognizance and the Remedy Sought Was a Remedy in Rem Against a Res Maritime. Jurisdiction of Such Causes Rests Exclusively in Admiralty.

A.

The Cause of Action Was Maritime and of Admiralty Cognizance.

The gravamen of this action was the seizure by municipal authority of a fishing boat's net on the high seas for alleged violation of a state enacted fishing regulation. The regulation was one which the state had power to make and power to enforce. One of the means of enforcement provided by the state statute was the *seizure* of the offending thing, to be followed by judicial proceedings, looking to an adjudication of forfeiture.

The offending thing was the net by which the vessel Reliance performed its maritime function. Without its purse seine, a vessel such as the Reliance cannot fish and

her utility is suspended. The net, in view of the law, is a part of the vessel itself, and partakes of its character as a thing maritime.

Although this proposition has never been seriously disputed by the Attorney General, we refer, without discussion, to the following authorities, many of which were cited by the state Supreme Court in each of its opinions herein:

The Dundee, 1 Hag. Ad. 109, aff'd *sub. nom.*;
Gale v. Laurie, 5 Barn. & C. 156;
Turner v. United States, 27 Fed. (2d) 134;
The Gaston, 25 Fed. (2d) 461;
The Buffalo, 148 Fed. 331;
The Witch Queen, Fed. Cas. No. 17916;
Haynie's Case, 1931 A. M. C. 381.

The net admittedly was seized upon the navigable waters of the Pacific Ocean. The state enforcement officer boarded the RELIANCE in such waters while she was actually engaged in fishing with the net, and took it into custody.

We therefore have the conjunction of a maritime *res* and a maritime *situs* of the seizure, which make the cause of action a cause of admiralty cognizance. This proposition is elementary, and has been sustained by the highest authority since the earliest days of the Republic.

United States v. La Vengeance, 3 Dall. 297;
The Sally, 2 Cranch. 406;
The Betsy and Charlotte, 4 Cranch. 443;
The Sarah, 8 Wheat. 391;
Armstrong's Foundry v. United States, 6 Wall. 766;
The Confiscation Cases, 7 Wall. 454.

It was suggested in the arguments in the state court proceedings that the regulation of fishing by a state in its territorial waters was not a matter of admiralty cognizance, wherefore a forfejture case for breach of such a regulation must be a non-maritime cause. If it were a material factor we could present a convincing argument to the effect that the entire subject of the regulation of fishing in navigable waters is inherently maritime in character, and causes involving fishing regulations are of admiralty cognizance, in principle and historically. But such a discussion, however interesting, has no place in this case, for it does not affect the character of the cause of action, whether the municipal law said to have been violated is maritime or non-maritime. The gravamen of the cause of action is not the *offense* but the *seizure*. An action for forfeiture is not criminal. It is a civil action, petitory in character, and its essence is to *vindicate the seizure*.

The right of a sovereign authority to seize property, either within its jurisdiction or on the high seas, rests upon the sovereign's municipal laws or upon its belligerent rights under the laws of war. The adjudication which follows the seizure is to determine whether or not the seizure was lawful. If it was not lawful it is tortious, and in either event the decree will so determine. The cause of action sounds essentially in tort, and determines the civil rights and liabilities brought into existence by the act of seizure, which is lawful or tortious as the court shall decide.

The test of jurisdiction in such and in any case of tort is the situs of the act complained of or sought to be vindicated; and if the act occurs with respect to a maritime *res* on the navigable waters, the gist of the action is *maritime tort* and within the jurisdiction of admiralty.

"Every violent dispossession of property on the ocean is *prima facie* a maritime tort; as such, it belongs to the admiralty jurisdiction."

Mr. Justice Johnson in *L'Invincible*, 1 Wheat. 238-257.

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, *including captures jure belli, and seizures on water for municipal and revenue forfeitures.*" (Italics supplied.)

Mr. Justice Clifford in *The Belfast*, 7 Wall. 624-37.

"A seizure is an assertion of title in the government and the subsequent proceedings in court are proceedings to try the title so asserted. When the object of such seizure is a ship, the subsequent proceeding is in substance a petitory suit, and within the admiralty and maritime jurisdiction of the United States."

Benedict. J., in *The Missouri*, Fed. Cas. No. 9652, at page 481.

"The court considers the law as completely settled by the case of The Vengeance. . . . It is the place of seizure, and not the place of committing the offense, which decides the jurisdiction. . . ."

Chief Justice Marshall in *The Betsy and Charlotte*, 4 Cranch. 443.

The gist of the action in this cause was to try the legality of the act of the state's enforcement officers in seizing the respondent net from the RELIANCE on the navigable waters. That act dealt with a maritime *res*, and had a maritime *situs*. The essential cause of action was maritime and of admiralty cognizance.

This argument might be greatly expanded and a multitude of other authorities cited. But the principle is clear and was accepted by the state Supreme Court in each of its opinions herein. It held in both opinions that the cause of action herein was of admiralty cognizance.

It was vigorously urged in the state courts that the State of California might enforce its "police regulations" in its own courts by any appropriate means. So it may. But when its police regulations confer a right in a maritime *res*, and the state attempts to assert that right on the navigable waters by a seizure, it engages in a maritime transaction, and jurisdiction of courts in such transactions is fixed by dominant federal law. Appropriate means are those which are appropriate to causes of admiralty cognizance. A state which engages in a maritime transaction is in no better position with respect to jurisdiction than the United States or a private citizen.

B.

THE PROCEEDINGS TAKEN IN THIS CAUSE WERE PROCEEDINGS IN REM. THE REMEDY SOUGHT AND ADJUDGED WAS A REMEDY IN REM.

> "The proceeding *in rem* which is in the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing, all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it, the property itself passes and not merely the title or interest of a personal defendant." (Citing cases.)

Mr. Justice Hughes in *Rounds v. Cloverport Foundry*, 237 U. S. 303-6.

It can hardly be disputed that the proceeding authorized by Section 845 of the Fish and Game Code, and the proceeding by which this net was adjudged to be forfeited by the Superior Court, fall squarely within that definition. The seized net was personified and sued as a sentient being, and it alone was adjudged and sentenced. The proceeding named no personal defendants whose titles or interests were attacked, and the judgment or decree purports to bind all the world.

The statutory proceeding has its prototype in the conventional admiralty suit *in rem* and the steps in each are parallel from beginning to end. There is a seizure or arrest, and a taking of the *res* into custody,—then a monition or posted notice to all the world,—and an invitation, expressed or implied, for all interested persons to appear and defend or be forever foreclosed. Finally, and after hearing, there is a judgment, operating directly upon the *res*, and binding all the world, including persons not in court, as well as those who have appeared, and a condemnation of the *res* to sale or destruction.

The statutory proceeding is patently and unmistakably the conventional civil law proceeding *in rem*, and all of the state courts' decisions herein have accepted it as such. We do not understand the final judgment of the state Supreme Court as denying that character, but only to hold that such a civil law proceeding became engrafted into the common law of England by statutory enactment. That aspect we shall cover in our second subdivision.

If it be accepted that the cause of action is maritime, and the proceeding and remedy are *in rem*, we have a case wherein *The Moses Taylor* rule is of vital importance.

C.

Examination of The Moses Taylor Rule.

In the year 1867 this court had before it, on writ of error from a court of the State of California, the case of *The Moses Taylor*, 4 Wall. 411, wherein, by a statutory proceeding of which the conventional *in rem* proceeding in admiralty was the prototype, a vessel had been proceeded against to enforce a state created lien in favor of an injured passenger. This court held that the remedy *in rem* which the state enactment purported to provide was not a remedy cognizable by the common law, but a remedy of civil law cognizance, and as such was not within the exceptions of the saving clauses of Sections 24 and 256 of the Judicial Code. The court said:

> "The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decrees, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.
>
> "The statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes

of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that state has decided in several cases. In Averill v. The Steamer Hartford, 2 Cal. 308, the court thus held, and added that 'the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act.' (pp. 427-8.)

"The case before us is not within the saving clause of the 9th section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (p. 431.)

The judgment against the vessel was reversed and the cause ordered dismissed for lack of jurisdiction in the state court.

This case was followed during the same time by *The Ad. Hine v. Trevor*, 4 Wall. 555; 18 L. Ed. 451, wherein a state court had sought to enforce against a vessel, by proceeding *in rem*, a state created lien for collision damage. Again this court denied the jurisdiction of the state courts, saying:

"But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even

mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That, after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the western states.

"While the proceeding differs thus from a common law remedy, it is also essentially different from what are in the west called suits by attachment, and in some of the older states foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the state.

"Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act.

"But it could not have been the intention of Congress, by the exception in that section (*sic*), to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated. (pp. 571-2.)

The two cases above referred to were the first pronouncements of this court pointing out the exclusive character of the jurisdiction of the federal courts in admiralty in proceedings and causes *in rem*, and effectually checked a purported and growing admiralty jurisdiction in state courts under the purported authority of the procedural lien laws of the several states. California, which prior to *The Moses Taylor* decision had held that its statutes authorized a proceeding *in rem* "governed by the principles and forms of admiralty courts". (*Averill v. The Steamer Hartford*, 2 Cal. 308), quickly fell into line with the rule in *The Moses Taylor*, and repudiated any such jurisdiction in its courts. (*Crawford v. The Bark Caroline Reed*, 42 Cal. 469.)

The Moses Taylor and *The Ad. Hine* dealt with tort liens which existed by virtue of the general maritime law, but the doctrine of exclusive jurisdiction in admiralty was soon extended to cover maritime contract liens which had no existence in the general maritime law, and owed their existence to state statutes.

Thus in *The Glide*, 167 U. S. 606, a Massachusetts statute had purported to create a maritime lien upon a vessel for supplies and repairs furnished in her home port, which lien was not permitted by the general maritime law as it then existed. Means were provided in the enactment for the enforcement of the lien by proceedings *in rem* in the state courts. This court held that the *creation* of the lien was a valid exercise of state legislative power, for, as Congress had not undertaken to legislate with respect to such liens, a state might properly do so. But, this

court held, the *enforcement* of such a lien was a matter of admiralty cognizance, and it could only be enforced *in rem*, in an appropriate proceeding in a federal admiralty court. This court said:

"In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: (1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. (2) For repairs and supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. (3) Whenever the statute of a state gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. (4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts

of the United States have jurisdiction, *and exclusive jurisdiction*, to enforce that right according to their own rules of procedure. 148 U. S. 1, 11-13, 13 Sup. Ct. 500." (pp. 621-2.) (Italics supplied.)

In *Knapp Stout & Co. v. McCaffrey*, 177 U. S. 638, the doctrine of *The Moses Taylor* was examined in its application to a state court proceeding to foreclose a *possessory* lien, based upon a maritime subject matter, and there the doctrine was held not to apply, as the proceeding was not *in rem* but *in personam*. Mr. Justice Brown pointed out the essential distinction, saying:

> "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in the admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute of a common law remedy." (p. 648.)

Reference should also be made to *Rounds v. Cloverport Foundry Co.*, 237 U. S. 303, and to *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, wherein Mr. Justice Brandeis wrote the most recent pronouncement of this court as to the scope and limitations of the saving clauses:

> "The 'right of a common-law remedy,' so saved to suitors, does not, as has been held in cases which

presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means *other than proceedings in admiralty* which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases.) *A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction.* (Citing cases.) But otherwise the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit." (Italics supplied.) (pp. 123-4.)

See also:

1 *Benedict Admiralty*, 6th Ed., Chap. 4, pp. 33-42.

In the state courts the Attorney General claimed that *The Moses Taylor* rule was limited to cases of maritime liens based upon contract and tort, and did not include seizure and forfeiture causes. No such qualification on the doctrine of *The Moses Taylor* case can be found in or inferred from any pronouncement of this court, nor is any other qualification or limitation placed upon it. The rule is flatly and unqualifiedly that *no proceeding in rem* may be entertained by a state court in a cause of admiralty cognizance, and no remedy *in rem* afforded.

We can think of no principle or reason which would call for or justify an exception as to any sort of proceeding *in rem*, and certainly none has ever been suggested. We are confident, therefore, that the rule of *The Moses Taylor* applies in any cause of admiralty cognizance, whether it

sound in contract or in tort, or be invoked to enforce a maritime lien or vindicate a maritime title or a maritime right. If the cause is maritime and the proceeding *in rem*, any court but a federal court of admiralty is without jurisdiction.

D.

The Authority of Smith v. Maryland in the Light of The Moses Taylor Rule.

It has been observed by this court that the exclusive character of the admiralty jurisdiction *in rem* was never brought to the attention of the court until the term of 1866, although prior to that time several of the states had, by statute, created various rights *in rem* in things maritime, and provided for their enforcement by suits *in rem* in state courts.

The Glide, 167 U. S. 606-15-16;

Knapp Stout & Co. v. McCaffrey, 177 U. S. 638.

In 1855, twelve years before the decision in *The Moses Taylor*, this court had before it the case of *Smith v. State of Maryland*, 18 How. 71. A fishing boat had been seized by a sheriff and adjudged forfeited by a state justice of the peace, for alleged violation of a state statute prohibiting the taking of oysters in territorial waters, which was forbidden, and forfeiting to the state the vessel employed therein.

In this court the state statute and proceeding in the state court were challenged as repugnant to the commerce clause and to the admiralty and maritime jurisdiction clause of the federal constitution.

This court held that as the state retained title to its submarine soil, in trust for the common enjoyment of

public rights, including the right of taking fish and shell fish, and might regulate the modes of such enjoyment to prevent the destruction of the fishing, and such regulation was not in conflict with but in furtherance of public rights, such regulation, even to the extent of providing for forfeiture of offending vessels, was not repugnant to the commerce clause.

As to the constitutional provision extending the judicial power of the United States to all causes of admiralty and maritime jurisdiction, the court said, on the authority of *United States v. Bevans*, 3 Wheat. 386, that this clause did not affect the jurisdiction nor the legislative power of the states over its territorial waters, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. Then, without further discussion, the court said:

> "As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion that it is not repugnant to this clause of the constitution." (p. 76.)

The sections of the Judicial Code upon which *The Moses Taylor* decision was based, were not mentioned or apparently considered by the court.

In the trial court herein, and in the District Court of Appeal, *Smith v. Maryland* was held to be decisive of the case at bar, and *The Moses Taylor* and the cases following it were said to be without bearing on the question involved [R. 7, 33]. The Supreme Court in its first opinion said that later decisions of this court, directly to the contrary, had overruled *Smith v. Maryland* [R. 39], and that statement was not criticized in the second opinion.

The statement of the California Supreme Court that *Smith v. Maryland* had been overruled, taken without the background of the issues litigated in this cause, is a little sweeping, for undoubtedly there are several points in *Smith v. Maryland* which are entirely sound today. The court undoubtedly meant that to the extent that the decision directly or indirectly sanctioned a proceeding *in rem* in a state court to accomplish a forfeiture based on maritime seizure, it had been overruled by *The Moses Taylor* and the later cases herein discussed.

To that extent the California Supreme Court is right, for on the question of state jurisdiction *in rem* the implications of *Smith v. Maryland* cannot be squared with the pronouncements in *The Moses Taylor*, *Ad. Hine v. Trevor* and the later cases.

The Moses Taylor rule was novel and revolutionary, and this court, later, had occasion to comment, as indicated in the first paragraph of this subdivision, that the "exclusive of admiralty jurisdiction *in rem*" had not theretofore been brought to its attention.

Smith v. Maryland undoubtedly will be relied upon in opposing counsel's argument in this court, but, we submit, the case is no longer authority sanctioning state court jurisdiction in any cause of maritime seizure.

A word may be in order concerning other causes in seizure and forfeiture, wherein *The Moses Taylor* rule has been overlooked. Some of them are cited in the last decision of the California Supreme Court [R. 46, fol. 126]. Characteristic of these is the first case cited, *State v. Umaki*, 103 Wash. 232. It is evident from the report that neither court nor counsel realized that the question was in the case. The same is true in *Mirkovich v. Milnor*,

34 Fed. Supp. 409, where, however, the point was not directly involved.

The extent and limitations of the admiralty jurisdiction, and the possibilities of infringement by state courts, are questions which come within the experience of only a small proportion of the general bench and bar, and it is not surprising that most cogent points are frequently overlooked.

On the other hand, forfeiture causes have been examined in the light of *The Moses Taylor* rule by several of the inferior federal courts, and conclusions in accordance with the rule have invariably been reached.

The most recent case is *The Bessie Mac* (W. D. Wash.), 21 Fed. Supp. 220. A fishing vessel and her net were seized by state authorities under a Washington statute in all essential respects the equivalent of the California statute here involved. The authorities filed a "petition" in the state Superior Court for a decree of forfeiture. The owner filed a possessory suit *in rem* in admiralty in the United States District Court, in which the state authorities appeared and moved to dismiss the cause, claiming the right to proceed under the state statute *and in the state court*. The District Court denied the motion, holding that the exclusive jurisdiction of the cause was in admiralty. *The Moses Taylor* and the other cases herein discussed were cited as authority.

The Bessie Mac was accepted as an authority in support of the California Supreme Court's first decision [R. 39], but was rejected in the second decision on the ground that the court had "failed to consider that the proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act" [R. 46].

The Elezena (E. D. Va.), 53 Fed. 359, involved libels in admiralty by materialmen and seamen against a vessel which had previously been declared forfeited by decree of a Virginia state court for violation of oyster taking laws. The claimants were the purchasers at the state forfeiture sale. The former owners were not before the admiralty court and their interests were not involved.

The court held that the state court proceedings were incapable of divesting the rights of prior maritime lienors, despite unequivocal terms of the statute providing for the cutting off of the rights of all persons. The court said:

> "The states in ceding, by the constitution, to the judicial power of the United States the cognizance of 'all cases of admiralty and maritime jurisdiction,' retained no part of the jurisdiction, civil or criminal; and when Congress created certain courts as admiralty courts, the admiralty jurisdiction passed exhaustively to them by virtue of the constitution, and it was unnecessary for Congress to enact in express words, as it did, that this jurisdiction in civil causes should be exclusive. The jurisdiction *in rem* belonging to admiralty courts, that is to say, the power to deal with ships by name as sentient beings, irrespectively of ownership, or other condition or circumstance,—belongs exclusively and peculiarly to the admiralty, and cannot be conferred, either for civil or criminal purposes, by state legislation, upon the common law courts of a state, so as to operate in derogation or exclusion of the power of the admiralty to enforce maritime liens in due course of admiralty procedure.
>
> "In evasion of these settled principles, it avails nothing to contend that the police laws of a state are superior to them." (p. 365.)

That is clearly and unmistakably *The Moses Taylor* rule, although that case is nowhere mentioned in the opinion.

We have found no appropriate case, whether of seizure and forfeiture or otherwise, where *The Moses Taylor* rule has been brought to the attention of the court and has been disregarded. We submit it cannot be disregarded in this case.

II.

The Remedy Provided by the California Statute Is Not a Common Law Remedy, Such as Is Saved in Admiralty Causes by the United States Judicial Code.

In both opinions, the California Supreme Court accepted as sound the propositions discussed in the foregoing subdivision, except that in the last opinion a qualification was sought to be added to *The Moses Taylor* rule; which is that the rule does not apply in proceedings *in rem* in forfeiture causes.

It was held that a proceeding *in rem* for forfeiture of things maritime, contrary to proceedings *in rem* to enforce other maritime rights, was a "traditional common law remedy," and as such within the saving clauses of the Judicial Code. In forfeiture cases, says the court,—there are concurrent remedies *in rem* in admiralty and at common law!

The basis of this extraordinary and startling pronouncement seems to be that the researches of the author of the court's last opinion have disclosed: (1) that statutory forfeitures have been part of the law of England, at least since the seventeenth century; (2) that the Court of

King's Bench, and other courts exercising common law jurisdiction, have adjudicated rights under these forfeiture statutes; and (3) both in England and this country, courts of general jurisdiction have taken jurisdiction of proceedings *in rem* for forfeiture. From these premises the court concluded that the entire forfeiture scheme, substantive and remedial, became a part of the common law of England, prior to the separation of the American Colonies, and all remedies appropriate thereto became and are remedies of common law cognizance.

Examination of these premises will demonstrate that none of them will support the conclusion on principle or authority.

The opinion states that the common law of England, as adopted in the courts of American states, includes not only the unwritten law of England, but also the Acts of Parliament enacted prior to the separation. This is true, but to a very qualified extent. The constitutions or the legislatures of many states have provided, and the courts have held that the rule of decision in matters not covered by local statute, shall be the common law of England, and that, it frequently has been held, includes certain Acts of Parliament which deal with subjects of the common law, substantive and remedial.

But it by no means follows that every act of Parliament dealt with common law subject matter or became, even in England, a part of the common law. The law of England was and is a complex *corpus juris* and embodies much that has come from other systems, particularly the civil law. Laws of great antiquity and involving most important human rights were founded entirely on the civil law, and the procedures and remedies incident to them

were administered by courts whose structure and machinery were utterly foreign to common law concepts. Ecclesiastical rights, maritime rights, and the vital rights pertaining to crown revenues were largely administered in courts whose procedure was essentially a civil law procedure, and which, incidentally, those administering the common law sometimes viewed with suspicion and abhorrence.

There were, of course, many Acts of Parliament which affected or dealt with matters exclusively of civil law cognizance, some exclusively of common law cognizance, and others of such general application that they affected all systems, courts and subjects to varying degrees. A statute in its substantive aspects might apply to the whole realm, but in its procedural and remedial aspect, if any, affect one or several systems and one or several jurisdictions.

The jurisdictions of America did not adopt, as their rule of decision, the laws and procedures of *England*, which would have included civil, maritime and ecclesiastical law and procedure. They adopted only the common law of England, and took unto themselves only those parts of the unwritten and statute law of the mother country which were essentially part and parcel of the common law system.

A system of forfeitures in favor of the sovereign authority and a procedure for their enforcement had long been a part of the English common law scheme, but in its essence and incidents they were entirely different from the statutory forfeitures which were considered in the state Supreme Court's last opinion, and which are the prototype of the California statute here under consideration. Those common law forfeitures followed conviction or attainder of a personal defendant, the forfeiture rested exclusively

upon the conviction and affected the property of the personal defendant alone or, in cases of attainder, those of his blood. These common law forfeitures were unenforceable by proceedings *in rem* in any court.

The statutory forfeiture did not regard the conviction of any personal defendant or even the guilt or innocence of the owner. It took place by operation of law upon bare use of the property in the interdicted act. The title of the owner became immediately divested and the rights of the crown, captors and informers came into being. These statutory forfeitures, we believe, go considerably back of the Navigation Act of 1660 (12 Car. II, Ch. 20; 7 Eng. Stat. at Large), to which the state court's opinion refers, but they had their roots in the civil law, and were entirely foreign to common law concepts. They were of continental origin, were brought to England by the Normans, and formed one of the subjects of jurisdiction of the Court of Exchequer, set up by the Conquerer. They were usually, but not exclusively, enforced by the peculiarly civil law remedy of condemnation and sale *in rem*, which the civil law Court of Exchequer and the courts of admiralty were able to accomplish by their peculiar civil law machinery.

In *The Palmyra*, 12 Wheat, 1, 7, Mr. Justice Story had before him an admiralty cause of statutory seizure and forfeiture of a vessel for piratical aggression. It was urged in opposition to the decree of forfeiture that there was no record of conviction *in personam* of a personal defendant for the offense charged in the libel. In disposing of this objection Justice Story took occasion to point out the distinction between the common law forfeiture where, in common law contemplation, title of the

offender was not divested until conviction, and "seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer." (p. 7.)

It is apparent, therefore, that the forfeitures contemplated in the statutes, of which 12 *Car. II*, Ch. 20, is an example, were not of common law origin or cognizance, even in their substance, and it is, to say the least, doubtful if in any aspect they ever became a part of the "common law of England", as that term is used in the enactments and cases relating to the rule of decisions in American courts. Essentially these statutes deal with civil law.

In its substantive aspect, any act of Parliament became a part of the supreme law of England, and, in so far as these statutes enacted that there was a change in title *ipso facto* on the commission of the offense, they provided a principle of *substantive law* which all courts were bound to accept and follow in any judicial determination. Obviously no court, whether it was proceeding in a common law cause or in a cause of civil law cognizance, could refuse to apply the general substantive law. So, to that extent, it must necessarily be said that the substantive *rights and burdens* which the statutes created were within the cognizance of *all* courts and systems.

But, assuming that the principle of forfeiture by operation of law became a substantive rule of common law cognizance, it is certainly not true that each and every *remedy* by which that principle might be given effect became a common law remedy.

The author of the first opinion in the California Supreme Court distinctly pointed out that in questions of conflict between state and federal law, there was an es-

sential distinction between matters of substantive law and matters relating to the jurisdiction of courts in the administration of remedies. [R. 37.] In the last opinion, that essential distinction was entirely ignored.

In any cause, the substantive *rights and duties* of the parties to the transaction are of universal judicial cognizance, and must be regarded by courts of law, as well as courts of admiralty. But when we come to the consideration of *remedies*,—the means by which those rights are to be enforced or the wrongs redressed,—we have an entirely different situation. A remedy available under one system of procedure may be impossible under another, because the courts of the latter system are without the process and machinery to give it effect.

So, while it might fairly be said that the substantive rights of the crown, captors and informers, and the loss of right by the owner of the forfeited property, became matters of common law cognizance, the same is not true of all the remedies available under the various judicial systems by which the rights might be asserted.

These statutory forfeitures are almost invariably in this country, and usually in England, enforced by the civil proceeding *in rem* for direct condemnation and forfeiture. This is not a remedy which was cognizable at common law, and before the merger of the English courts under the Judicature Act, the common law courts,—King's Bench and Common Pleas, and the common law jurisdiction of the Court of Exchequer, had no machinery to afford such a remedy had their jurisdiction been invoked. There was such machinery only in the courts of civil jurisdiction,—the admiralty court and in the revenue side of the Court of Exchequer. After the merger of all these

courts, as the High Court of Justice, any remedy available under English law could be had in any division, but we understand that each division in practice adheres more or less to the subjects and practices of its predecessor court, and that forfeiture cases *in rem* still go to the Exchequer Division and to the Division of Divorce, Admiralty and Probate.

But, regardless of this recent merger of the courts of England into one great court of general jurisdiction, the essence of the remedy *in rem* in any cause remained and remains the same. A remedy *in rem* is and always was, not a common law remedy but a civil law remedy.

That proposition is in no way affected by the evident contemplation of the English forfeiture statutes that remedies thereunder might be under several systems, for, as we have heretofore pointed out, there may be several remedies, concurrent or mutually exclusive, to enforce a single right or redress a single wrong. Some remedies available under the forfeiture statutes were clearly cognizable at common law, and as we shall see, in proper cases the common law courts have enforced them by common law procedure.

The most modern English statute mentioned by the state Supreme Court is *The Customs Consolidated Act of 1876* (39 & 40 Vict. Ch. 36), wherein it is provided that all duties, penalties and forfeitures may be sued for, prosecuted, determined and recovered by action, information or other appropriate action in the High Court of Justice in England, in the Superior Courts of common law at Dublin and Edinborough, or by information before any justice. Under that authorization an action could be maintained for any penalty or for the recovery of any

forfeited property against any personal defendant by common law process, or by direct condemnation and sale by process and proceeding *in rem*, according to the practice of the old civil courts. The earliest statute mentioned (12 *Car. II*, Ch. 20) indicates the same broad scope of remedy, although couched in less modern phraseology:

> ". . . and one-third to him who shall seize, or sue for the same in any court of record, by bill, information, plaint or other action."

The word "information" appears in both statutes, and manifestly refers to the complaint or libel by which the jurisdiction of the civil law courts, admiralty or exchequer, was and still is invoked.

It is unmistakable, therefore, that even the seventeenth century statutes, upon which the author of the opinion relies, did nothing more than to create a new sort of forfeiture, different from the old common law forfeitures, and indicate that it might be given effect by any court within the limitations of its own peculiar procedure and process. They did not transmute or purport to transmute a civil law remedy into one at common law, or *vice versa*.

If, as the California court seems to believe, the effect of the forfeiture statutes, particularly 12 *Car. II*, Ch. 20, was to make a proceeding *in rem* into a common law remedy, it is to be expected that in the 200 years which elapsed between the enactment of the statute and the Judicature Act of 1873 there would have been some evidence of its utilization in a common law proceeding, or some assertion of jurisdiction *in rem* by courts administering the common law. The sixteenth and seventeenth century judges of the common law were notoriously jeal-

ous of their jurisdiction, and over the admiralty courts they claimed the power of prohibiton. Yet we have found no case where any court of common law ever attempted to proceed *in rem* in a forfeiture or other cause, or claimed the power to do so. We are satisfied that none can be found.

The state Supreme Court has referred to two common law cases wherein, it is inferred, the court gave effect to the forfeiture statutes *by a proceeding in rem*. Examination of the cases discloses that the proceedings were not remotely in the nature of proceedings *in rem*, but, on the contrary, were conventional actions *in personam*, wherein the court gave effect to the forfeitures strictly within the limitations of common law process and by a common law judgment.

In *Roberts v. Withered* (1696), 5 Mod. 193, 12 Mod. 92, an informer, on behalf of himself and the crown, filed *an action in detinue* against personal defendants in possession of property alleged to be forfeited under the Statute 12 *Car. II*, alleging that title was vested in the crown and the plaintiff, that the property was in the possession of the defendants, and a demand therefor and refusal. Judgment was prayed against the defendants for the possession of the property or its value. The court held (presumably on proof of the facts justifying a forfeiture) that title had passed from its former owners, that by bringing the suit the plaintiff became vested with title (one-third to him who shall seize, inform or sue for the same, etc.), and was entitled to judgment against the defendant as prayed. The action was the conventional action of detinue, the judgment operated only against the named personal defendants, and the court did not purport

to proceed against the property in any manner whatsoever. Exactly the same sort of action might be authorized by any state in its own courts today. It has no more the aspect of a proceeding *in rem* than an action on a promissory note.

Wilkins v. Despard, 5 Durnf. & East. 112, is even less in point. It was an action in trespass by the owner of forfeited property which had been seized by a Provincial Governor. The governor defended by justification, alleging the facts on which the forfeiture was based. It was held on the authority of *Roberts v. Withered* (*supra*), that title of the owner was divested by the offense and that the governor's seizure and possession were thereby justified. Here again is a conventional common law process and judgment with no element of a proceeding *in rem*.

The courts of common law in England undoubtedly had jurisdiction to hear and determine questions of substantive right, under the forfeiture statutes, and to determine, *when a common law remedy was sought*, whether a forfeiture had *occurred*. That naturally might be the basis of the right asserted or the defense interposed. To the extent, then, of determining that a forfeiture had or had not taken place, the common law, as well as all other systems, had cognizance, and this court has so held in the case of *Gelston v. Hoyt*, 3 Wheat. 246.

Therein an action in trespass against federal officers had been commenced in a state court. The charge was that they had converted to their own use a certain privateer owned by the plaintiff. The defense was that the vessel had been seized for forfeiture under the laws of the United States. Interposed was a general and several special pleas, the latter raising issues as to the propriety of

the seizure and the question of probable cause. At the trial it was shown that in the federal admiralty cause *in rem*, which followed the seizure, the vessel had been exonerated and a certificate of probable cause had been denied. The state courts gave and affirmed a judgment for the plaintiff. On writ of error to this court the propriety of the special pleas was considered, and it was held that the propriety of the seizure and the question of probable cause had been concluded by the decree in the admiralty cause. The decision was based on two grounds: (1) because the decree in the admiralty suit was *res adjudicata* against all the world, and (2) because, by the Judiciary Act, jurisdiction of *all* causes of admiralty cognizance *and* cognizance of all seizures and forfeitures under the laws of the United States were *exclusively* in the United States district courts.

It was urged that in England, jurisdiction *in rem* in forfeitures was exclusive in the Court of Exchequer, yet, notwithstanding, the cases of *Wilkins v. Despard* and *Roberts v. Withered* showed that the common law had at least a concurrent jurisdiction over causes involving forfeitures. Justice Story pointed out that the forfeitures involved in these cases were under the Act 12 *Car. II*, wherein it was enacted that one-third of the forfeitures shall go to him who shall "seize, inform or sue for the same in any court of record", which showed that cognizance of forfeitures under that statute was not exclusive in the exchequer court, and was at least concurrent in the courts of common law.

The conclusion is, of course, correct, but Justice Storey was talking about essential jurisdiction to hear and determine substantive rights and titles under the statute.

Common law undoubtedly had concurrent jurisdiction with the exchequer and the admiralty for that purpose, but it does not and cannot follow that it could exercise that jurisdiction by administering civil law remedies such as the proceeding *in rem*.

The common law had and no doubt still has power to administer these forfeiture statutes to the extent that the law permits them to be administered *in personam*, by process by which a personal defendant is brought before the court and affected, favorably or unfavorably, by a personal judgment. But it did not and cannot proceed *in rem*.

We must ever remember in cases of this kind that the conflict between federal and state jurisdiction with which we are concerned is not over the power to determine substantive rights, but the power to administer remedies, and the distinction between right and remedy must always be regarded. That which is saved to suitors in maritime causes by the saving clauses is not substantive rights cognizable at common law, but common law remedies.

Neither do the saving clauses save remedies in courts which are of non-admiralty jurisdiction and are often called courts of common law. In the absence of constitutional or other paramount restriction, any legislature may confer on any court the power to administer new remedies strange to the common law system. Such powers have often been conferred on courts of general jurisdiction, or even upon courts of the English system whose background was primarily common law. The remedies and forms of admiralty and of other systems have often been so conferred, and this is particularly true of the proceeding *in rem*. The state legislatures and the federal

Congress have freely borrowed it for use by non-admiralty courts and, in so far as it is to be administered in causes not of admiralty cognizance, it is right and proper that they did so. The framers of our government were jealous of the jurisdiction of admiralty, but not of its forms and processes.

But as this court and other courts have repeatedly held, a remedy borrowed from the civil law does not become a common law remedy because it happens to be administered by a "common law" court.

That point has also been overlooked or ignored by the California Supreme Court, which says, in the last opinion, that it is "necessary to determine" if the proceeding *in rem* is a type of action which was cognizable *in a common law court* [R. 43].

It is entirely immaterial that jurisdiction *in rem* has been exercised by the federal courts on their law side, or by many state courts of general jurisdiction. Neither is it material that the Parliament of England has conferred power to proceed *in rem* on the present courts and divisions of the English system which may have historically exercised strictly common law powers. The essence of the remedy *as a civil law remedy* remains.

This court has said:

> "The case before us is not within the saving clause of the Ninth Section. That clause only saves to suitors 'the right of a common law remedy where the common law is competent to give it.' It is not a remedy in the *common law courts* which is saved, but a *common law* remedy. A proceeding *in rem* as used in the admiralty courts *is not* a remedy afforded by the common law; *it is a proceeding under the civil law.*

When used in the common law courts it is given by statute." (Italics supplied.)

Mr. Justice Field in *The Moses Taylor*, 4 Wall. 411-31.

That statement of the essential character of the proceeding *in rem* has been quoted, referred to and affirmed in case after case, and it has been followed consistently by the courts of all the states whenever and wherever it has been brought to their attention. It has stood as a bar for seventy-five years to the exercise of state court jurisdiction *in rem* in any cause of admiralty cognizance, and if the rule is to be changed, only this court can change it.

The state Supreme Court has said that *The Moses Taylor* and other cases announcing the rule of interdict against proceedings *in rem* in a state tribunal were concerned with types of *in rem* proceedings which were foreign to the common law, and where an action *in rem* against a vessel has no counterpart in a common law court, These cases are not controlling, says the court, in circumstances where the common law provides an analogous remedy [R. 45-6].

This statement bewilders us as much as any thought in the opinion, for where, in the entire history of common law actions and common law remedies, can any action or remedy be found which is remotely analogous to the civil proceeding *in rem* for forfeiture? We mean no disrespect to the learned author when we put the query as bluntly as did Judge Wells in *Ashbrook v. The Golden State*, Fed. Cas. No. 574, p. 13:

"What lawyer ever knew or heard of a proceeding *in rem* as a common law remedy?"

If the author meant that substantive *rights* under the forfeiture statutes were cognizable in common law actions, the attempt to distinguish the cases holding to *The Moses Taylor* rule is patently bad, for the common law had and has just as much and no more cognizance over the substance of rights arising from maritime contracts and maritime torts, such as were under consideration in the cases applying *The Moses Taylor* rule, as it has of the rights created by the forfeiture statutes. The suitors in those cases had a maritime right, created or recognized by a state statute, to have recovery of money for the breach of contract, or for their damages due to tort. Those rights were certainly within the cognizance of a common law court or any other court, and a common law court could have adjudged and enforced them by common law process, if the owners or contractors could be reached for service.

But if the suitors desired to enforce those rights by foreclosure of the maritime lien,—the *jus in re*, which the statutes created or recognized, they found the common law impotent to accomplish that result, for it did not possess the remedial machinery to act directly against the property.

Precisely the same thing would occur in a cause involving forfeiture. If the offended crown or a captor or informer could find and reach a personal defendant who had possession of the forfeited property or who had received its proceeds, an action at law or equity would recover for the suitor the property or its value. But if the suitor wished to enforce his title, his *jus in re*, by direct proceeding against the forfeited thing, civil law remedies alone would accomplish it.

If there is any valid distinction between the right to enforce *in rem any property right*, whether it be a right by way of lien or a right by way of title, we do not sense it, and cannot sense it unless more fully instructed.

Indications in the opinion suggest the thought on the state court's part that a proceeding *in rem* for forfeiture was a common law remedy in England, because the Court of Exchequer enforced statutory forfeitures. A state court case is cited (*Reynolds v. The Steamboat Favorite*, 10 Minn. 100), wherein the court referred to these as "forfeitures according to the course of the common law" [R. 46]. The exchequer forfeitures were not remedies by common law, but by civil law. Justice Story in *The Palmyra*, 12 Wheat. 1-14, made this clear when he pointed out the distinction between common law forfeitures and exchequer forfeitures, which we have already considered. Furthermore, in the exercise of its revenue jurisdiction, the Court of Exchequer did not purport to function as a court of common law. It did have (or at least it asserted and "got away with") jurisdiction over certain causes of common law cognizance, but its functions in the matters of crown revenues were so entirely divorced from its asserted common law jurisdiction that Blackstone excluded that aspect of exchequer jurisdiction from the Commentaries as being a matter with which the great treatise on the common law had no concern.

2 Jones' Blackstone, p. 1544.

In concluding this presentation it may be well to suggest the serious consequences of any qualification upon the rule of *The Moses Taylor* being allowed to stand unchallenged:

The exclusive character of the admiralty jurisdiction to proceed *in rem* has been settled, without qualification, for over seventy-five years. It is a jurisdiction upon which rests the security of maritime property and maritime commerce. Shipowners throughout the world have known that their vessels can be proceeded against only within the bounds of a uniform and long established procedure,—that of the United States courts, sitting in admiralty. If *The Moses Taylor* rule is relaxed, even to the extent of permitting state courts to proceed directly against maritime property, for forfeiture alone, it places every ship or maritime *res* which comes into any port of the United States at the mercy of all the varying views and foibles of legislators, judges and magistrates whose training and experience may give them little understanding of affairs maritime, and whose political philosophy may be entirely out of sympathy with the considerations of harmony and uniformity of decision which impelled the founders of our government to protect the integrity of the admiralty jurisdiction with these statutory safeguards. If the rule of *The Moses Taylor* be so qualified, any state legislature or port authority in the land may provide for penalties and forfeitures to be imposed directly upon vessels, domestic or foreign, for almost any conceivable offense or trans-

gression of local police laws or regulations, without even a personal notice to an innocent owner who may be half a world away; and without the safeguard of a uniform and time-tested procedure administered by trained jurists. A local authority may seize and a magistrate condemn a ship for alleged violation of fishing regulations, refusal to accept a local pilot, anchoring in a particular place, or even for sounding a whistle; and unless some federal court or higher state court could find some other ground for intervention, the jurisdiction and judgment of the local court or magistrate could not be drawn into question. Such a possibility, to say nothing of the actuality, is unthinkable.

And, we further submit, the qualification of *The Moses Taylor* rule could not stop by excluding forfeiture causes alone, for if any proceeding *in rem* is permitted to state courts, the reasons and principle which underlie the rule are discredited and weakened. If a local authority may proceed against a ship for a forfeiture, it may do so for the property rights and liens of its citizens which local authority has created, and which may be totally at variance with the principles of harmony and uniformity of the maritime law. *The Moses Taylor* rule, once qualified, will ultimately fall, and if it falls, with it will go the heart of the federal jurisdiction of admiralty in this country.

CONCLUSION.

In its first opinion the Supreme Court of California decided the cause soundly and rightly. That decision was in accord with the paramount federal law and should never have been disturbed. In the second judgment the court permitted itself to be led astray by unsubstantial reasoning, and has announced a rule of decision which is contrary to the Acts of Congress and the binding decisions of the highest federal authority.

It is confidently submitted that the judgment of the California Supreme Court should be reversed, with the instruction that this cause was not within the jurisdiction of the California Superior Court, and should be dismissed for lack of such jurisdiction.

Respectfully submitted,

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